IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 04-3966

MELISSA ABDOUCH

Appellant,

v.

VICKI BURGER, RAINA BOYUM, KATHRIN BETZING and ALISON DOWNS, in their individual capacities and in their capacities as employees of the South Dakota Department of Social Services,

Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

THE HONORABLE KAREN SCHREIER
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

REPLY BRIEF OF APPELLANT

Michael D. Bornitz
Cutler & Donahoe, LLP
North Phillips Avenue, 9th Floor
Sioux Falls, SD 57104-6725
(605) 335-4950
(605) 335-4961 (fax)
Attorneys for Appellant

Matthew T. Tobin
Johnson, Heidepriem, Miner, 100 Marlow & Janklow,
431 North Phillips Avenue
Suite 400
(605) 338-4304
(605) 338-4162 (fax)
Attorneys for Appellees

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REPLY

A. Defendants Were Not Entitled to Qualified Immunity.

Defendants are quick to point out their visceral "concerns" and "fears," which they believe justified their actions throughout the seven months they advocated for termination of Melissa's parental rights. Appellee's Brief at 5, 6, 8. Interestingly, however, defendants completely ignore the compelling evidence proving their actions were not objectively reasonable. First, defendants do not explain their damaging admissions that they had no evidence Melissa either knew about Avery's abuse or should have known about it. App. 96, 104, 61-62, 65, 69-70.[1] All legal actions must be supported by evidence, and this was the ingredient defendants were obligated but failed to include in their neglect prosecution.[2] App.

[1] These admissions are based on several factors. First, the medical doctors testified that although Avery's injuries were severe, they would not be visible to a layperson. Add. 8. In addition, Dr. Ridder stated Melissa had never been anything but a caring, loving and conscientious mother. Supp. App. 001. Second, the law enforcement investigation found no evidence Melissa knew or should have known about the abuse. App. 87-88. Third, defendants' own investigation showed no evidence the other two children had been abused or that Michael ever abused Melissa. App. 83, 129, 137; Supp. App. 002. Fourth, Melissa's psychological evaluation showed there was no reason to suspect she would be a threat to her children. App. 33. Fifth, Melissa's alcohol and drug abuse assessment revealed no concerns. Supp. App. 005-006. Sixth, Melissa's counselor was working with her on any issues defendants felt needed to be addressed. Supp. App. 007.

[2] Boyum testified important evidence the Department would rely upon includes what law enforcement and medical doctors find, and that a great deal of weight would be put on their opinions. Supp. App. 008-009. Thus, the lack of supporting

111, 61. Second, defendants disregard the significant fact that they fired deputy state's attorney Pam Tiede from the neglect case because she told them there was insufficient evidence to proceed. Add. 9, App. 130, 122, 138. Tiede's testimony is important because, as the Department's attorney, she was the person in charge of the prosecution, and also because she provided a more objective viewpoint regarding the merits of the neglect prosecution. Third, defendants fail to explain the powerful testimony from their own expert, Judith Hines, that she did not see anything in the record that warranted the Department seeking to terminate Melissa's parental rights. App. 73. Defendants' failure to address this evidence is remarkable given their desire to seek termination up until the day before the dispositional hearing.[3] Add. 10. These factors and the others cited in Appellant's Brief that were likewise ignored show defendants' actions were not objectively reasonable.

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evidence from the medical doctors and law enforcement is particularly noteworthy in proving defendants' actions were not objectively reasonable.

[3] Defendants state they "never filed a termination petition." Appellee's Brief at 18. This appears to suggest they never sought to terminate Melissa's parental rights. Any such suggestion is disingenuous because, as Melissa demonstrated in her Appellant's Brief, defendants did seek termination. Add. 6, App. 30, 44, 142, 130-31, 147. In addition, no such pleading was required. As Judge Kean pointed out in a letter to counsel, the Department was simply required to notify the parties of its intentions. Supp. App. at 010**.** Interestingly, defendants gave no such notice to Melissa. Add. 10. The record is also devoid of any such notice to Michael, despite the fact termination of his parental rights was sought at the dispositional hearing. Add. 10.

Incredibly, defendants believe they should be "applauded" for their conduct in this case. Appellee's Brief at 18. According to defendants, their efforts were laudable and the process over which they presided was a model of efficiency to be emulated. At the same time, defendants concede they "did not know if the Plaintiff was aware of the abuse or not." Id. at 7. They also say they were "faced with a situation in which it was not clear for a significant amount of time that Michael was, in fact, the abuser."[4] Id. Defendants then say they "could not rule out the Plaintiff as the abuser." Id. These concessions are wholly irreconcilable with their obligation to prove neglect by clear and convincing evidence, and they further undermine the claim their actions were objectively reasonable.

Defendants' reliance upon their subjective "concerns" and "fears" to justify their actions also has no merit. Defendants' biggest "fear" appears to be that Melissa and Michael *could* reconcile or that Melissa *might* allow Michael to see Avery. Appellee's Brief at 8. Indeed, defendants asked Judge Kean to continue the neglect case so they could continue to monitor Melissa. Add. 10; Supp. App.

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[4] Michael testified Melissa never saw him harm Avery and that she did not know about the abuse. D. App. at 13. Defendants correctly point out that Melissa was aware Michael had a temper and asked him to seek counseling, but defendants fail to point out the critical fact that this occurred at about the same time Avery's injuries were discovered. Id.

011-012. Their "fear" is completely undermined by their own testimony at the dispositional hearing:

> Q: And let me ask you this. If you're concerned – are you concerned about them reconciling; is that what you're telling the Court?
>
> A: Somewhat, but that's not a great – one of the greatest concerns. I mean, it's in the back of my mind, but I'm not necessarily saying it's going to happen or not.
>
> Q: You don't have any evidence that they are going to reconcile, do you?
>
> A: No.
>
> Q: She's never told you they are going to be reconciling?
>
> A: No.
>
> Q: You haven't conducted any surveillance or anything like that to determine whether they are going to reconcile, have you?
>
> A: No.
>
> Q: You haven't seen them together acting as a couple, have you?
>
> A: No.

App. 63-64; see also Supp. App. 022-023. (Betzing testimony at October 2000 adjudicatory hearing that as far as she knew, Melissa was not living with Michael and that she had not asked anyone to investigate this issue further). To this day, Melissa remains divorced from Michael. Add. 9.

Defendants' claimed "fear" Melissa *might* allow Michael to see Avery is likewise undermined. Defendants testified there was no evidence Melissa allowed Michael to see Avery; that Michael was even at Melissa's home; or that Melissa had been manipulated in any way by Michael. App. 68-69, 123, 140, 114; Add. 7, App. 63-64, Supp. App. at 019**,** 004, 024; see also Supp. App. 003 (Melissa told Downs she would do whatever was necessary for her children, and Downs had no reason to disbelieve Melissa). Nevertheless, defendants' visceral "fear" is impossible to disprove; they have created a classic "catch-22."

Defendants also claim their praiseworthy actions were due in part to a "concern" that Melissa's divorce was a sham. Appellee's Brief at 6. However, the record evidence shows that when the osteogenesis imperfecta test results were returned prior to the adjudicatory hearing, Melissa resigned herself to the fact that Michael abused Avery and began the divorce process. Supp. App. at 025**,** Add 7, App. 113. This is also when Melissa asked Michael to move out of the house. App. 117. Amazingly, at the same time defendants wanted Melissa to divorce Michael and told her she would never have her children back if she did not divorce him, Add. 7, they purport to question her motives.

Defendants' other "concern" was a lack of language in Melissa's divorce decree governing Michael's visitation rights with Avery (although defendants presumably had no such concern regarding the other two Abdouch children).

Appellee's Brief at 5. This "concern" is illusory because the Department's own attorneys conceded that when visitation rights, or lack thereof in Michael's case, are established in an abuse and neglect case, they take precedence over any order in a divorce case. Supp. App. 029, 026-027.

Defendants admittedly had reasonable suspicion to remove Avery from Melissa's custody and investigate to determine whether she was guilty of abuse or neglect. That being said, this reasonable suspicion lasted only so long. Defendants ignore the fact that it began to dissipate when the law enforcement investigation ruled out Melissa as a suspect and focused exclusively upon Michael at the end of August of 2000. App. 87-88, 91, 83. They ignore that it was quickly evaporating as their own investigation produced nothing more than subjective "concerns" and "fears." They ignore that it had completely vanished by the October 2000 adjudicatory hearing, when defendants admitted having no evidence Melissa was guilty of neglect.[5] App. 96, 104, 61-62, 65, 69-70. Defendants' actions in continuing to seek termination of Melissa's parental rights after this point were taken not only in the absence of evidence sufficient to sustain their clear and

[5] Defendants cannot claim Judge Kean explicitly or tacitly approved of their continued prosecution after that hearing. This is because his only inquiry under state law was whether Avery had been abused or neglected; not who may have perpetrated the abuse or neglect. Supp. App. at 028. Defendants also cannot claim that Judge Kean continued Avery's placement in foster care. First, there is no cite for this proposition. Second, it is the Department that makes such decisions. Supp. App. at 020-021.

convincing evidence burden of proof, but also in the admitted absence of any supporting evidence.

Defendants' position is untenable for another reason. Using defendants' logic, they could justify an indefinite separation of a parent from her child based on their subjective "concerns" and "fears" and in the absence of any evidence of neglect. At the same time, it would be impossible to disprove those "concerns" and "fears." Continuing a criminal prosecution under the same circumstances would be in clear violation of 42 USC § 1983. The same unsupported prosecution in a neglect case is not automatically excusable because of the state's compelling interest in protecting children. Defendants cannot immunize themselves simply by citing the general rule that qualified immunity is a difficult defense to overcome. Children certainly need to be protected from abuse and neglect, but parents like Melissa also have rights, and in this case the defendants went too far.

This Court should also reverse the trial court's grant of summary judgment because defendants have no immunity when, like here, their actions are outside the scope of their authority. Defendants are not protected by qualified immunity if their actions were motivated by personal animosity. Manzano v. South Dakota Dep't of Social Services, 60 F.3d 505 (8th Cir. 1995)("in the absence of evidence of improper motive, we se no constitutional violation…."); Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)(the qualified immunity

defense is intended to provide "protection to all but the plainly incompetent or those who knowingly violate the law."). In this regard, it is noteworthy that defendants did not refute Melissa's evidence showing they were motivated by personal animosity.

Melissa's personal animosity evidence is sufficient to create a genuine issue of material fact. Howard testified Betzing and Burger were "petty and personal" as opposed to professional. App. 137. Heinemann testified there was a "personality conflict" and that defendants viewed Melissa's questions as disrespectful of their authority. App. 120. Sanchez testified the "situation" was degenerating rapidly and there was frustration. App. 142. Betzing and Burger also made unreasonable demands of Melissa, such as that she no longer bring her children to Dr. Ridder; that she submit to another psychological evaluation; and that she obtain financial counseling. App. 55, 126, 138, 123, 58-60, 126-127; Supp. App. 013-018 (Howard cross-examination of Betzing on these issues). Finally, Melissa testified that based on the foregoing she felt defendants were being malicious and were personally attacking her. App. 145. Viewing this evidence in the light most favorable to Melissa precludes entry of summary judgment in defendants' favor.[6] See Kara B.

[6] This Court has noted that a court should look at all available decisional law including decisions of state courts, other circuits and district courts. Norfleet by and through Norfleet v. Arkansas Dep't of Human Services, 989 F.2d 289, 291 (9th Cir. 1993).

v. Dane County, 542 N.W.2d 777 (Wis. Ct. App. 1995)(concluding social workers not entitled to summary judgment on section 1983 claim because "whether, under applicable legal standards, they violated the children's rights is an issue so closely intertwined with the defendants' intent and motive and other factual issues as to be inappropriate for resolution on summary judgment."); Howard v. Malac, 270 F.Supp.2d 132 (D. Mass. 2003)(holding defendants who fabricated portion of report not entitled to qualified immunity).

B. Defendants Were Not Entitled to Absolute Immunity.

Defendants continue to improperly contend that they are entitled to absolute immunity because their role in "filing" proceedings to protect abused minors is functionally equivalent to the role of a prosecutor in "initiating" a prosecution. Appellee's Brief at 19. First, Melissa does not question the initiation of the abuse and neglect proceeding. Second, defendants did not "file" anything. Rather, it was Detective Larson who took temporary custody of the Abdouch children and filed notice thereof, Supp. App. 030, and it was attorney Tiede who filed the abuse and neglect Petition. Supp. App. 031-032. Third, Melissa's claims are not based on defendants' in-court testimony. Defendants' actions in investigating this neglect case and advocating prosecution is not sufficiently related to initiating judicial proceedings to justify absolute immunity. See Hodorowski v. Ray, 844 F.2d 1210 (5th Cir. 1988)(social worker's "actions in taking possession of children were not

integral to the judicial process" and therefore were not within the scope of absolute prosecutorial immunity); Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987)(act of filing "verified complaint" that initiates state custody is sufficiently removed from judicial phase to deny absolute prosecutorial immunity). Doe v. County of Suffolk, 494 F.Supp. 179 (E.D. N.Y. 1980)(analogizing social worker's function to that of policeman rather than prosecutor and limiting such worker's immunity to qualified rather than absolute immunity); Rinderer v. Delaware County Children and Youth Services, 703 F.Supp. 358 (E.D. Pa. 1987)(holding that "social workers, unlike prosecutors, do not enjoy absolute immunity."). As a result, defendants are not entitled to absolute immunity.

CONCLUSION

There is abundant evidence in this record showing that defendants' actions were not objectively reasonable under the circumstances. This evidence creates a genuine issue of material fact that cannot be decided on summary judgment. Melissa accordingly asks this Court to reverse the decision of the trial court.

Dated this 25th day of February, 2005.

CUTLER & DONAHOE, LLP
Attorneys at Law

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Michael D. Bornitz
100 North Phillips Avenue, 9th Floor
Sioux Falls, SD 57104-6725
Telephone: (605) 335-4950
Facsimile: (605) 335-4961

CERTIFICATE OF COMPLIANCE

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF MINNEHAHA)

Michael Bornitz, being first duly sworn upon oath, states and alleges as follows:

1. I am an attorney admitted to practice before the Eighth Circuit Court of Appeals and a member of the law firm of Cutler & Donahoe, LLP, 100 North Phillips Ave, 9th Floor, Sioux Falls, SD 57104, attorneys for Appellant Melissa Abdouch.

2. The Reply Brief of Appellant was prepared using Microsoft Word 2003.

3. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Appellant complies with the type volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) and contains 1,894 words which were counted using the Microsoft Word 2003 program.

4. Also, pursuant to Eighth Circuit Rules of Appellate Procedure 28A(d), I further certify that the CD-Rom provided to the Court and to opposing counsel have been scanned for viruses, using Norton AntiVirus software, and the CD-Rom is virus free.

Dated this 25th day of February, 2005.

Attorneys for Appellant:
Cutler & Donahoe, L.L.P.

/s/ Michael D. Bornitz
Michael D. Bornitz

Subscribed and sworn to me
this 25th day of February, 2005.

/s/ Jody L. Harrell
Jody L. Harrell
Notary Public State of South Dakota
My commission expires: 12/20/07

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Appellant's Reply Brief and Appellant's Reply Brief on CD-Rom was mailed by regular United States mail, first class postage prepaid on this 25th day of February, 2005.

/s/ Michael D. Bornitz
Michael D. Bornitz